EDITOR'S NOTE

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Supreme Court, U.S.
FILED
JUL 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-17 (3)

In The

Supreme Court of the United States

OCTOBER TERM, 1986

City of Corona
A Municipal Corporation;
City Attorney of Corona, California; James J. Clancy

Petitioners,

vs.

Superior Court of the State of California for the County of Riverside; The "Book Store", being a bookstore and motion picture arcade, located at 601 West Sixth Street, Corona, California; Helen E. Ebel; Thomas Charles Ebel; Does 1 through 10, inclusive,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPPLEMENTAL APPENDIX

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, Calif. 91352
(818) 352-2069

Attorney for Petitioners
Counsel of Record.

1260 M

SUPPLEMENTAL APPENDIX

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APPENDIX A

OPINION OF THE CALIFORNIA SUPREME COURT FILED ON SEPTEMBER 16, 1985, ENTITLED THE PEOPLE EX REL. JAMES J. CLANCY, AS CITY ATTORNEY, ETC., ET AL., PETITIONERS V. THE SUPERIOR COURT OF RIVERSIDE COUNTY, RESPONDENT; HELEN E. EBEL, ET AL., REAL PARTIES IN INTEREST

HELEN E. EBEL ,ET AL., PETITIONERS,

V.

THE SUPERIOR COURT OF RIVERSIDE COUNTY, RESPONDENT; THE PEOPLE EX REL. JAMES J. CLANCY, AS CITY ATTORNEY, ETC., ET AL., REAL PARTIES IN INTEREST A1-A26

SUPREME COURT
FILED
SEP 16 1985
LAURENCE P. GILL, Clerk

_____
Deputy

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

HELEN E. EBEL et al.,

Real Parties in Interest.

HELEN E. EBEL, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Real Parties in Interest.

L.A. 32041

Super Ct. No. 160775

We evaluate the propriety of a contingent fee arrangement between a city government and a private attorney whom it hired to bring abatement actions under the city's nuisance ordinance. We hold the arrangement inappropriate under the circumstances, and in the interests of justice grant the extraordinary relief of disqualifying the attorney.

In 1981 Helen Ebel obtained a business license from petitioner City of Corona (City), and began operating a business known as the Book Store. The Book Store sells sexually explicit reading materials and provides an arcade section for viewing sexually explicit films. This action arises from the City's efforts to close the Book Store.

Within a few months after Ebel opened for business the City adopted two

ordinances regulating adult bookstores, one defining "sex oriented material" and the other restricting the sale of such material to certain zones in the City. The city manager informed Ebel she would be compelled to move the Book Store because it was within 750 feet of a church that operated a school for minors. Ebel filed an action in federal court attacking the constitutionality of these ordinances. The circuit court of appeals directed entry of a preliminary injunction in her favor. (Ebel v. City of Corona (9th Cir. 1983) 698 F.2d 390.) The district court thereafter held the ordinances unconstitutional and granted a permanent injunction, and the judgment was affirmed on appeal. (Ebel v. City of Corona (9th Cir. Aug. 1, 1985) ___ F.2d ___.)

Frustrated by its defeats in federal court on the constitutional

issues, the City retained the services of Attorney James J. Clancy to abate nuisances under a new ordinance proposed on the same day. The ordinance defined a public nuisance as "Any and every place of business in the City . . . in which obscene publications constitute all of the stock in trade, or a principal part thereof . . . ." Clancy had drafted this and the previous ordinances relating to the sale of sexually explicit material, and had presented them for consideration by the City Council. He is associated with an organization entitled Committee for Decency through Law.

Two weeks later the ordinance was passed. Following an investigation by the police department, the City adopted a resolution declaring the Book Store to be a public nuisance and revoking its business license. A complaint was

filed, on the relation of the City and Clancy as its "special attorney," against Ebel, her son Thomas Ebel, Eugene Van Zee, and the Book Store, for abatement of a public nuisance, declaratory judgment, and an injunction. Police officers were sent to the Book Store to photograph the magazines on sale and the movies available for viewing. The City then served a subpoena duces tecum on Timothy Groover, a clerk at the store.[1/] The subpoena demanded that Groover (now Thomas Ebel) appear in court and produce the 262 publications that the police had photographed, to permit the court to determine whether the publications are obscene.

The court allowed the City to amend its complaint by substituting "City

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[1/] Groover was subsequently discharged. By stipulation the parties have deemed the subpoena to have been served on Thomas Ebel, currently a clerk at the Book Store.

Attorney of Corona" as Clancy's title in the action, and granted defendants' motion to prevent production of the magazines. The City petitions for writ of mandate to compel the court to vacate its order that Thomas Ebel need not bring the magazines to court, and to order Helen Ebel to produce the magazines. The Ebels cross-petition to compel the court to vacate its order denying defendants' motion to disqualify Clancy as attorney for the City, and its order permitting plaintiffs to amend the complaint. They also seek a writ of prohibition to bar the People from proceeding with Clancy instead of the regular City Attorney of Corona as its representative, and from permitting the City to proceed as a party.

I. Enforcement of the Subpoena Duces Tecum

The parties hotly debate the issue whether the subpoena duces tecum, which

orders Thomas Ebel to produce 262 magazines offered for sale at the Book Store, violates his privilege against self-incrimination.[2/] Thomas Ebel is potentially subject to prosecution under Penal Code section 311.2, which prohibits the sale of obscene material. The parties agree that certain elements of the crime have been established by independent evidence (i.e., existence, possession, and authentication), and thus the act of producing the magazines is to that extent not "testimonial" and "incriminating." (See Fisher v. United States (1976) 425 U.S. 391, 408.) However, the parties disagree whether the element of scienter, which must be proved in order to convict, has been

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2/ The City also seeks a writ to compel Helen Ebel to produce the magazines. But no subpoena was served on Helen Ebel, and this request was never presented to the trial court. In addition, since we conclude that Thomas Ebel may not claim the protection of the Fifth Amendment in this case, the issue is moot.

established by other evidence and whether it would be established by the act of gathering the magazines and bringing them into court.

We need not reach this question. The Fifth Amendment cannot be "employed by an individual to avoid production of the records of an organization, which he holds in a representative capacity as custodian on behalf of the group. . . . [T]he papers and effects which the privilege protects must be the property of the person claiming the privilege, or at least in his possession in a purely personal capacity." (Bellis v. United States (1974) 417 U.S. 85.) This rule applies even if the evidence might incriminate the holder personally. (Id. at p. 88.) The magazines named in the subpoena duces tecum are the property of the Book Store, an artificial entity that cannot claim the privilege against

self-incrimination. (Id. at p. 90.) Thomas Ebel has possession of the magazines only in his capacity as clerk at the Book Store. He therefore cannot avoid compliance with the subpoena.

II. The Contingent Fee Arrangement

The contract of employment between the City and Clancy contains a fee provision according to which Clancy is to be paid $60 per hour, "provided, however, that with respect to each and every suit undertaken by Attorney hereunder which results in a final judgment against CITY, said fee shall be reduced to $30.00 per hour . . . and provided further that said fee of $60.00 shall also be reduced to $30.00 per hour . . . in each and every suit undertaken by ATTORNEY hereunder in which CITY is a successful party if and to the extent that the CITY does not recover its attorney's fees from the unsuccessful

party of parties."

The Ebels contend it is improper for an attorney representing the government to have a financial stake in the outcome of an action to abate a public nuisance. They maintain that a government attorney prosecuting such actions must be neutral, as must an attorney prosecuting a criminal case. Accordingly, we must first examine the requirement of neutrality imposed on government attorneys in certain cases, and then determine whether this requirement applies to attorneys prosecuting public nuisance actions.

At the outset we emphasize that the courts have authority to disqualify counsel when necessary in the furtherance of justice. (Code Civ. Proc., § 128, subd.(a)(5); William H. Raley Co. v. Superior Court (1983) 149 Cal.App.3d 1042, 1048; see also People

v. Superior Court (Greer) (1977) 19 Cal.3d 255, 261, fn. 4; People v. Municipal Court (Byars) 77 Cal.App.3d 294, 298-299.) Thus we may order that Clancy be dismissed from the case if we find the contingent fee arrangment prejudices the Ebels.

In People v. Superior Court (Greer), supra, 19 Cal.3d 255, we reviewed the responsibilities associated with the prosecution of a criminal case: "The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. [Citations.] In all his activities, his duties are conditioned by the fact that he 'is the representative not of any [sic] ordinary party to a controversy, but of a sovereighty whose obligation to govern impartially is as compelling as its

obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" (Id. at p. 266, quoting Berger v. United States (1935) 295 U.S. 78, 88.) The American Bar Association's Code of Professional Responsibility elaborates on the public prosecutor's duty to seek justice: "This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all . . . ." (ABA Code of Prof. Responsibility, EC 7-13.)

Thus a prosecutor's duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly. These duties are not limited to criminal prosecutors: "A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results." (Id., EC 7-14.)

Not only is a government lawyer's neutrality essential to a fair outcome

for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive. (See id., EC 9-1, 9-2.)

When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function. For example, in People v. Superior Court (Greer), supra, 19 Cal.3d 255, we disqualified the prosecutor because a woman working in his office was the victim's mother , was a material witness, and stood to gain custody of

the victim's children if the defendant was convicted. in Tumey v. Ohio (1927) 273 U.S. 510, the United States Supreme Court outlawed a system whereby the mayor of a town served as judge in liquor possession cases in which the punishment was a fine. The money paid pursuant to the fine went into a fund from which the mayor could recover his costs for hearing the case. And in Ward v. Village of Monroeville (1972) 409 U.S. 57, an Ohio statute authorizing mayors to sit in ordinances violation cases, the fines from which would go into the municipality's coffers, was held unconstitutional. "[T]he test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and

true between the state and the accused . . . .'" (Id. at p.60, quoting, Tumey, supra, 273 U.S. at p. 532; see also People v. Conner (1983) 34 Cal.3d 141 [conflict of interest where deputy district attorney was a witness to and arguaby a victim of the criminal conduct being prosecuted by others in his office].)

A city attorney is a public official. (People ex rel. Chapman v. Rapsey (1940) 16 Cal.2d 636, 639.) The American Bar Association's Code of Professional Responsibility addresses the special considerations applicable to a lawyer who is also a public official: "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." (ABA Code of

Prof. Responsibility, EC 8-8.) "[A]n attorney holding public office should aviod all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success of personal interests." (ABA Committee on Prof. Ethics, opn. No. 192 (1939); see also People v. Conner, supra, 34 Cal.3d 141, 146.)

It is true that the retainer agreement between the City and Clancy provides that Clancy is to be "an independent contractor and not an officer or employee of City." However, a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to

which greater standards of neutrality apply, he must adhere to those standards.

In the case at bar, Clancy has an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City.

Contingent fee contracts for criminal prosecutors have been recognized to be unethical and potentially unconstitutional, but there is virtually no law on the subject. "[T]he contingent fee is generally considered to be prohibited [in] the prosecution and defense of criminal cases. However, there are so few cases, and these are predominantly old, that it is doubtful that there can be said to be any current

law on the subject. Usually cited is a 1920 case from New Mexico in which the court refused to enforce a contingent fee contract calling for a larger fee if the defendant was convicted, for a lawyer assisting a prosecuting attorney. The court declared that the contingent element was against public policy because it tended to bring about conviction regardless of the prosecutor's primary duty to see that justice was done." (MacKinnon, Contingent Fees for Legal Services (1964) p. 52.) More strongly worded is the comment to standard 2.3(e) of the American Bar Association Standards Relating to the Prosecution Function: "It is clear that [case-by-case] fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, are totally unacceptable under modern conditions, and should

be abolished promptly."

The justification for the prohibition against contingent fees in criminal actions extends to certain civil cases. As discussed above, the rigorous ethical duties imposed on a criminal prosecutor also apply to government lawyers generally. "The county attorney is a county office and as such is a representative of the people, although his duties relate only to civil matters." (ABA Committee on Prof. Ethics, opn. No. 186 (1938).)

Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case. (See, e.g., Denio v. City of Huntington Beach (1943) 22 Cal.2d 580 [contingent fee arrangement

whereby the city hired a law firm to represent it in all matters relating to the protection of its oil rights].) But just as certainly there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement.

In City of Los Angeles v. Decker (1977) 18 Cal.3d 860, we held applicable to an eminent domain action the requirement that government attorneys be unaffected by personal interests: "Occupying a position analogous to a public prosecutor, [the government attorney] is 'possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' (Professional Responsibility: Report of the Joint Conference (1958) 44

A.B.A.J. 1159, 1218.) The duty of a government attorney in an eminent domain action, which has been characterized as 'a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner' [citation], is of high order." (Id. at p. 871.)

Similarly, the abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is added to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First

Amendment interest in having such material available for purchase. Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated.

Public nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.)[3/] A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen. Code, § 372.) "A public or common nuisance . . . is a

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[3/] Clancy relies on an Indiana authority, Sedelbauer v. State (Ind.App. 1984) 455 N.E.2d 1159. In that case, however, the court approved the assistance of a private attorney only because he appeared "not in place of the State's duly authorized counsel." (Id., at p. 1164.)

species of catch-all criminal offense, consisting of an interference with the rights of the community at large . . . . As in the case of other crimes, the normal remedy is in the hands of the state." (Prosser & Keeton, the Law of Torts (5th ed. 1984) p.618; see also Board of Supervisors v. Simpson (1957) 36 Cal.2d 671, 672-675.) A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney.[4/]

[4/] Although Clancy prepared the ordinance for the City, and used a personal employment contract he had prepared for other cities, it appears he may have little discretion in the decision whether to bring an action under the public nuisance ordinance; he does so at the direction of the city council. However, as we emphasized in the criminal arena, "the prosecutor's discretionary functions are not confined to the period before the filing of charges. . . . [W]hile the trial judge has the power to prevent actual prosecutorial misconduct in court, within those bounds the district attorney possesses the advocate's traditional

Thus we hold that the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action. In the interests of justice, therefore, we must order Clancy disqualified from representing the City in the pending abatement action.[5/]

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ability to conduct his case in the manner he elects. [Citations] A district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be born of objective and impartial consideration of each individual case." (People v. Superior Court (Greer), supra, 19 Cal.3d 255, 267.)

5/ Code of Civil Procedure section 731 provides in part that "A civil action may be brought in the name of the people of the State of California to abate a public nuisance . . . by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists . . . ." The Ebels maintain this provision makes it improper for the City instead of the State to bring this suit. But cities have long maintained public nuisance actions. (See County of Sierra v. Butler (1902) 136 Cal. 547.) In section 731 the legislature meant to allow cities, as well as the state, to continue to

Let a writ of mandate issue directing the court to vacate its order that Thomas Ebel need not produce the magazines listed in the subpoena, and issue a new order enforcing the subpoena and dismissing Clancy as the City's attorney in the pending action. In all other respects the petition is denied.

MOSK, J.

WE CONCUR:

BIRD, C.J.
KAUS, J.
BROUSSARD, J.
REYNOSO, J.
GRODIN, J.
LUCAS, J.

Footnote continued from preceding page:

bring such actions: the statute gives district attorneys and city attorneys the concurrent right to file such suits, and even provides that the city attorney "must bring" the action if directed to do so by the legislative authority of the city.

The Ebels argue further that section 731 makes it improper for Clancy instead of the official attorney of Corona to prosecute the action. The point may seem technical in this case, but could become crucial if a city council and its city attorney differed as to whether a nuisance action should be brought. Thus on remand the action herein should be brought in the name of Dallas Holmes, the Corona City Attorney. The City may hire Clancy to represent Holmes. (Gov. Code, § 37103.)

APPENDIX B

PETITION FOR REHEARING IN PEOPLE EX REL. CITY ATTORNEY OF CORONA, ET AL., V. SUPERIOR COURT OF THE STATE OF CALIFORNIA B1-B51

B-1

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

HELEN E. EBEL et al.,

Real Parties in Interest.

HELEN E. EBEL et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Real Parties in Interest.

L.A. 32041

Superior Court No. 160775

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioners, People of the State of California on relation of the City Attorney of Corona, California, and City of Corona, a municipal corporation respectfully petition for a rehearing in the above-entitled cause to reconsider the decision of this Court, filed on September 16, 1985, on the grounds that the decision is erroneous in that:

(1) The opinion of the Court contains material misstatements of law and fact which have caused the Court to arrive at an erroneous result.

(2) The opinion has failed to address several issues and arguments which arose at oral argument on June 12, 1985 and, in doing so, has ignored an entire line of constitutional questions involving due process and equal protection of the law, and the doctrine of separation of powers.

(3) The opinion has failed to answer the narrow question which was presented by the

Petition for Writ of Mandate herein, which was based on U.S. v. Doe. In deciding the petition on its own grounds, the Court has assumed the existence of material facts which are not in evidence and which contradict the record.

INTRODUCTION

In its petition for writ of mandate, filed on May 1, 1984, Petitioners, People of the State of California on relation of the City Attorney of Corona, California and City of Corona, a municipal corporation, presented a single question which was stated as follows at page 13 of the petition:

" QUESTION PRESENTED

" Whether, under recognized principles of general law or waiver, a person called as a witness at a hearing on a motion for a preliminary injunction can be compelled under a subpoena duces tecum to produce 262 magazines where:

" (A) the identity and existence of the 262 magazines has previously been established by a declaration in support of

the issuance of the subpoena, and

" (B) there is a showing by independent evidence that such magazines at the time of service were in the possession of such witness in a representative capacity and for the purpose of offering the same to the public for sale at the "Book Store" as a part of a commercial venture, and

" (C) the preliminary injunction hearing was originated by the City of Corona under a claim of damage to public morals, and in response to a challenge of the operator of the "Book Store" that she has a right to continue offering such magazines for sale at the "Book Store" pending the determination of a public nuisance abatement (Obscenity) lawsuit arising out of such possession for sale."

On May 23, 1984, The Court of Appeal issued its alternative writ, which required the Court to show cause why it should not issue a new order denying the Defendants' motion for protective orders and quashing the subpoena duces tecum.

In its return to the alternative

writ, the Real Parties in Interest filed an Answer and Cross-Petitioned for its own Petition for Writs of Mandate and Prohibition, seeking the following relief (see Return at page 10):

> " Cross-Petitioners THE BOOK-STORE, HELEN E. EBEL, and THOMAS CHARLES EBEL, by this verified Petition for Writs of Mandate and Prohibition, seek;
>
> " A. A Writ of Mandate ordering respondent Superior Court of the State of California for the County of Riverside to set aside and vacate its orders of April 20, 1984 which denied their Motion to disqualify attorney James J. Clancy and which granted Plaintiffs' Motion to amend their First Amended and Supplemental Complaint, and seek
>
> " B. Writs of Prohibition
>
> " 1. Restraining respondent Court from permitting Plaintiffs to proceed with the action to close the BOOKSTORE;
>
> " 2. Restraining respondent Court from permitting Plaintiff

THE PEOPLE OF THE STATE OF CALIFORNIA to proceed with this action

" (a) without Dallas Holmes, the City Attorney of Corona, and

" (b) with James J. Clancy and;

" 3. Restraining respondent Court from permitting Plaintiff CITY OF CORONA to proceed with this action."

On July 5, 1985, Petitioners filed a Replication in which they demurred to the Cross-Petition of the Return to the Petition for Writ of Mandate.

On July 24, 1984, the Court of Appeal set the case for arguments on September 5, 1984 and entered an order reading in part:

> "Argument will relate only to the merits of the original petition and response thereto. The request to file cross-petitions is denied."

On September 5, 1984, the Court heard oral argument on the issues raised

in the cross-petition as a part of the affirmative defenses of the Real Parties in Interest. On November 15, 1984, the Court filed its opinion granting the Peremptory Writ. In its opinion, the Court of Appeal ruled against the affirmative defenses of the Real Parties in Interest.

On December 19, 1984, the Real Parties in Interest filed a Petition for Hearing in this Court in which they argued that the Court of Appeal decision was in conflict with People v. DeRenzy, 275 Cal.App.2d 380 (1969) and with the U.S. Supreme Court ruling in United States v. Doe, ___ U.S. ___, 79 L.ed.2d 552 (1984).

In its Answer to the Petition for Hearing, filed on January 4, 1985, Petitioners argued that under the trial facts, Fisher v. U.S., 425 U.S. 391 and U.S. v. Doe, ___ U.S. ___, 79 L.Ed.2d

552 were squarely in point and controlled, and that: "The Court of Appeal's opinion is not in conflict with DeRenzy. DeRenzy is simply inapposite". (Our emphasis). See Petitioners' Answer at page 7, lines 26-27.

Due to the procedure formerly followed by this Court on petitions of this nature, the arguments before this Court on June 12, 1985 were inverted. Although the Real Parties in Interest were "appealing" the adverse decision of the Court of Appeal, this Court's granting of the petition for hearing placed Petitioners, rather than the Real Party in Interest, in the role of opening the argument before this Court, as if they were petitioning for the Writ of Mandate in the first instance. As soon as Petitioners' counsel had started his argument for issuance of the writ, based on U.S. v. Doe, the members of

this Court interrupted those arguments and for 30 minutes raised numerous questions regarding the affirmative defense issue of the Real Parties in Interest relating to the contingency fee issue. As a result, Petitioners' argument on the "Question Presented" in their application for the writ was never presented orally.

Petitioners' responses to the questioning by members of this Court at oral argument did, however, place before the Court a number of constitutional issues which had not appeared in the written briefs. Those arguments do not appear in the written briefs because the Court of Appeal did not allow the Real Parties in Interest to file a Cross-Petition. Petitioners contend that the constitutional issues raised at the oral arguments are substantial and that the Court's failure to address those issues

is error.

During the opposition oral arguments, the attorney for the Real Parties in Interest made several material misstatements of fact regarding the April 20, 1984 nearing before Judge Hennigan on Plaintiffs' motion to amend the complaint. In those arguments, Real Party in Interest failed to inform the Court that the record reflected that Judge Hennigan on April 20, 1984 had made specific findings of fact that: (1) the City Attorney had given his approval to the amendment, and (2) that the Petitioners' counsel was representing the City Attorney of the City of Corona and that the amendment was being allowed for that reason. In rebuttal, Petitioners' counsel noted the time constraints and lack of opportunity to respond occasioned by the sustained questioning by this Court, but called

the Court's attention to the misrepresentations of opposing counsel and requested the Court to examine the record in that regard. (See the "record" at Exhibit 9 to the petition for writ of mandate, Reporter's transcript for April 20, 1984 at pages 1-4.)

REASONS FOR GRANTING A REHEARING

1.

(A) THE DECISION OF THIS COURT IS PREMISED UPON A FUNDAMENTAL MISSTATEMENT OF FACT ARISING OUT OF A MISREPRESENTATION OF OPPOSING COUNSEL AT ORAL ARGUMENT ON JUNE 12, 1985.

The decision of this Court is premised upon a fundamental misstatement of fact arising out of a misrepresentation of opposing counsel at oral argument that: (1) the City Attorney had not given his approval to the amendment, and (2) that the Petitioners' counsel was not representing the City Attorney of the City of Corona. That

misrepresentation of opposing counsel was brought to the Court's attention by Petitioners' counsel at the close of oral argument on June 12, 1985.

The opinion at page 4, lines 5-7 makes the following material misstatement in its recitation of the Statement of Facts on record:

> "The court allowed the City to amend its complaint by substituting 'City Attorney of Corona' as Clancy's title in the action."

The above statement of fact should read:

> "The City moved to amend its complaint and the court, on April 20, 1984, upon a specific finding that (a) the City Attorney had given his approval to the amendment, and (2) that the Plaintiff in the action was representing the City Attorney of the City of Corona, allowed the City to amend its complaint by substituting the words, 'People of the State of California on the relation of the City Attorney of Corona, California' for the words, 'People of the State of California ex rel. James J. Clancy, as Special Attorney for the City of Corona, California'".

1.

(B) THE DECISION OF THIS COURT IGNORES THE FINDING OF FACT OF JUDGE HENNIGAN ON APRIL 20, 1984 THAT: (1) THE CITY ATTORNEY HAD GIVEN HIS APPROVAL TO THE AMENDMENT; AND (2) THAT ATTORNEY CLANCY WAS REPRESENTING THE CITY ATTORNEY OF THE CITY OF CORONA.

The decision of this Court ignores the Finding of Fact of Orange County Superior Court Judge Hennigan on Petitioners' Motion to Amend the Complaint on April 20, 1984 that: (1) the City Attorney had given his approval to the amendment; and (2) that Attorney Clancy was representing the City Attorney of the City of Corona. Judge Hennigan granted the motion to amend the complaint on April 20, 1984 because he found those facts to be true. The record, in that regard, appears at pages 1-6 of Exhibit 9 to Petitioners' Petition for Writ of Mandate, being the Reporter's Transcript of said hearing on April 20, 1984. The specific Finding of

fact appears at page 4, line 26 through page 5, line 12. Because it is crucial to this Petition for Rehearing, pages 1-6 are reproduced hereinafter in full:

"PROCEEDINGS OF APRIL 20, 1984

"(PEOPLE OF THE STATE OF CALIFORNIA "VS THE BOOKSTORE, CASE NO. 160755.)

" THE COURT: PEOPLE VERSUS THE BOOKSTORE.

" MR. CLANCY: JAMES J. CLANCY FOR THE PEOPLE. CAROL CLANCY ALSO FOR THE PEOPLE, YOUR HONOR.

" MR. DIAMOND: ROGER DIAMOND; HECHT DIAMOND AND GREENFIELD FOR THE DEFENDANTS.

" THE COURT: FIRST WE OUGHT TO TAKE UP THE MATTER OF THE CHANGE OF NAME OR AN AMENDMENT. IT'S MY INTENTION TO GRANT THAT. YOUR INTENTION IS BECAUSE THE CITY ATTORNEY IS NAMED INSTEAD OF THE NAMING AS AN INDIVIDUAL, DALLAS HOLMES.

" MR. DIAMOND: OUR POSITION IS WE DON'T BELIEVE DALLAS HOLMES WHO IS THE CITY ATTORNEY OF CORONA HAS AUTHORIZED THIS LAWSUIT OR IS WILLING TO PERMIT HIS NAME TO BE ASSOCIATED WITH IT, PRIMARILY BECAUSE THE LAWSUIT IS NOT BASED UPON LAW AND MAKES CONTENTIONS THAT ARE CONTRARY TO ESTABLISHED CASE LAW IN CALIFORNIA.

" WE BELIEVE THAT OUR MEMORANDUM OF POINTS AND AUTHORITIES PUT MR. CLANCY ON NOTICE. THIS WAS OUR CONTENTION, AND HE HAS HAD AN OPPORTUNITY TO SECURE SOME SORT OF WRITTEN APPROVAL FROM MR. HOLMES AND HAS NOT BEEN ABLE TO GET IT.

" IF MR. CLANCY WERE ABLE TO GET MR. HOLMES' APPROVAL, THERE WOULD BE NO PROBLEM. MR. HOLMES' NAME SHOULD APPEAR ON THE PLEADINGS. HE'S BRINGING THE ACTION ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA.

" MR. CLANCY IS NOT ABLE TO GET HIS APPROVAL. THAT'S OUR POSITION, AND WE BELIEVE THE NAME SHOULD APPEAR. IT'S NOT SIMPLY A TECHNICAL OBJECTION, BUT IT GOES TO THE HEART OF THE MATTER, BECAUSE WE DON'T BELIEVE THIS ACTION IS BEING PROSECUTED BY THE RIGHT PARTY, A FUNDAMENTAL OBJECTION, NOT A TECHNICAL DEFECT.

" WE BELIEVE MR. HOLMES SHOULD APPEAR AS THE ATTORNEY, OR HAVE HIS NAME APPEAR ON THE PLEADINGS, AND AUTHORIZE MR. CLANCY TO APPEAR IN HIS BEHALF.

" WHAT WE THINK HAS HAPPENED HERE, YOUR HONOR, IS WE BELIEVE THE CITY COUNCIL OF THE CITY OF CORONA MAY HAVE AUTHORIZED MR. CLANCY TO BRING THIS ACTION, BUT THAT THE CITY COUNCIL CAN DO THAT -- UP TO THE CITY ATTORNEY ACCORDING TO 731 OF THE CODE OF CIVIL PROCEDURE.

" IT'S A CRITICAL PROBLEM, BECAUSE THE CITY MAY NOT MAINTAIN THE ACTION. IT IS THE CITY ATTORNEY WITH THE APPROVAL OF THE CITY. THE CITY COUNCIL HAS BY-PASSED MR. HOLMES AND HAS TRIED TO GET SOME SPECIAL COUNSEL, WHO PROBABLY SOLICITED THIS CASE, ACCORDING TO THE EVIDENCE THAT WE'VE BEEN ABLE TO GATHER TO BRING THIS ACTION.

" WE THINK IT CRITICAL, AND IF MR. CLANCY HAS MR. HOLMES APPROVAL, ALL WE HAVE TO DO IS HAVE A STATEMENT FROM MR. HOLMES TO THAT EFFECT, AND WE DON'T HAVE IT.

" THE COURT: MR. DIAMOND, I RESPECT BOTH YOU AND MR. CLANCY AS I DO OTHER COUNSEL THAT APPEAR HERE. I THINK WHEN AN ATTORNEY APPEARS AND FILES AN ACTION, HE'S MAKING A REPRESENTATION TO THE COURT THAT HE HAS THE AUTHORITY OF HIS CLIENT TO REPRESENT THE CLIENT.

" MR. DIAMOND: MR. CLANCY, I THINK, BELIEVES HIS CLIENT IS THE CITY OF CORONA, AND THAT IS HIS CLIENT. WHEREAS, IN FACT, ACCORDING TO 731 OF THE CODE OF CIVIL PROCEDURE, THIS KIND OF AN ACTION HAS TO BE BROUGHT BY THE CITY ATTORNEY AND IN THE NAME OF THE PEOPLE OF THE STATE OF CALIFORNIA, NOT BY THE CITY COUNCIL HIRING AN OUTSIDE COUNSEL.

" THE COURT: BUT IT IS TRUE IT IS BROUGHT IN EFFECT FOR THE BENEFIT OF THE CITY. I DON'T THINK IN ANY OF THE CASES THE CITY ATTORNEY IS EXPECTED TO REACH INTO

HIS OWN POCKET AND PAY A PRIVATE ATTORNEY TO REPRESENT HIM IN THE MATTER, AND SO I THINK YOUR REMEDY HERE, IF YOU FEEL MR. HOLMES IS REFUSING, SHALL WE SAY, TO LET HIS NAME BE USED, YOU CAN TAKE HIS DEPOSITION.

" IN THE ABSENCE OF THAT, I THINK I HAVE TO ACCEPT COUNSELS' INNATE REPRESENTATION IN THE FILING OF THE SUIT THAT HE'S REPRESENTING THE CITY ATTORNEY OF THE CITY OF CORONA.

" MR. DIAMOND: PERHAPS WE CAN ASK MR. CLANCY, AS AN OFFICER OF THE COURT, TO MAKE A REPRESENTATION ON THE RECORD THAT HE HAS BEEN SPECIFICALLY AUTHORIZED BY MR. HOLMES TO BRING IN THE ACTION ON BEHALF OF THE CITY ATTORNEY.

" THE COURT: AS FAR AS I AM CONCERNED, WHEN HE FILES AN ACTION ON BEHALF OF THE CITY OF CORONA, HE'S MAKING THAT REPRESENTATION.

" AGAIN, IF MR. HOLMES DEPOSITION IS TAKEN, HE REPUDIATES MR. CLANCY'S REPRESENTATION, THAT MAYBE SOMETHING ELSE. AGAIN, IT MAY BE A QUESTION OF WHETHER THE DEGREE TO WHICH A CITY ATTORNEY, OR ANY ATTORNEY, HAS TO TAKE THE ORDER OF HIS CLIENT, IN THIS CASE THE CLIENT IS THE CITY OF CORONA, CITY COUNCIL TO MR. HOLMES, THOUGH SHOULD BRING THIS ACTION.

" SO ULTIMATELY, IT HAS TO BE BROUGHT IN THE NAME OF THE CITY ATTORNEY UNDER THE CODE. I THINK ULTIMATELY THE TRUE PARTY IN

INTEREST IS THE CITY, OR AS THE WORDING OF IT MAY STATE, THE PEOPLE OF THE STATE, BUT THE PEOPLE OF THE STATE, PARTICULARLY IN THAT PART.

" SO I AM GOING TO GRANT THAT, GRANT HIS MOTION TO SUBSTITUTE THE NAME. I FIND NOTHING THAT SAYS HE HAS TO NAME THE INDIVIDUAL CITY ATTORNEY, RATHER THAN JUST SIMPLY DESIGNATING HIM BY TITLE, BECAUSE HE'S DESIGNATED BY TITLE IN THE CODE SECTION, AND OBVIOUSLY, YOU COULD HAVE A SECTION WHERE AN ELECTION WOULD OCCUR AND GET A CHANGE IN THE CITY ATTORNEY, AND THERE SHOULD BE NO NEED TO CHANGE THAT.

" DO YOU WISH TO RESPOND TO THAT?

" MR. CLANCY: YES, YOUR HONOR.

" I WOULD LIKE TO SAY THAT IN HIS POINTS AND AUTHORITIES, MR. DIAMOND, PAGE 5, LINES 25 TO 28, MAKES THE FOLLOWING ARGUMENT AND SAID: 'DURING ARGUMENT, COUNSEL FOR THE DEFENDANTS STATED THAT MR. DALLAS HOLMES WAS UNWILLING TO BRING THIS ACTION. THIS STATEMENT HAS APPARENTLY BEEN PROVEN CORRECT'. I WOULD OBJECT TO THE MANNER IN WHICH THE DEFENDANT'S COUNSEL IS MAKING REPRESENTATIONS TO THE COURT.

" IF HE HAD ANY KNOWLEDGE TO THAT EFFECT, HE SHOULD HAVE FILED A DECLARATION AND NOT TO HAVE MADE A STATEMENT, POSITIVE STATEMENT THAT THIS IS EVIDENCE.

" THE COURT: THESE ARE ALL MATTERS OUTSIDE OF THE RECORD HERE.

" MR. CLANCY: I MAKE THE REPRESENTATION TO THE COURT THAT THE AMENDMENTS HAVE BEEN SUBMITTED TO DALLAS HOLMES. I TALKED TO DALLAS HOLMES THIS MORNING AND MADE KNOWN TO HIM THE ARGUMENT MR. DIAMOND WAS GOING TO MAKE, AND HE SAID "HE CAN'T MAKE THAT KIND OF AN ARGUMENT. I HAVE SEEN THE AMENDMENT, AND I STATED I HAVE NO OBJECTIONS", AND --

" THE COURT: HE CAN MAKE THE ARGUMENT, HE'S MADE IT. IT HASN'T SOLD SO FAR.

" MR. CLANCY: THAT'S THE REPRESENTATION I AM MAKING, THAT I TALKED ON A PHONE CONVERSATION WITH THE CITY ATTORNEY THIS MORNING, AND I MADE KNOWN TO HIM THE ARGUMENT THAT COUNSEL WAS GOING TO MAKE THIS MORNING, NOTWITHSTANDING THE AMEND-MENT WHICH HAS BEEN FILED.

" THE COURT: I WILL ORDER THE AMENDMENT TO PROCEED, BECAUSE THAT'S ONE THING THAT BOTHERED ME BEFORE.

" NOW COMES THE QUESTION OF THE SUBPOENA DUCES TECUM.

" MR. DIAMOND: BEFORE WE GET TO THAT, CAN I ASK THE COURT ONE QUESTION?

" THE FORMAT OF MR. CLANCY'S MOTION WAS SIMPLY REFERRING TO CERTAIN LINES THAT SHOULD BE STRICKEN. IT SEEMS TO ME

WE SHOULD NOW HAVE A PLEADING THAT IN EFFECT ADOPTS THE INTERLINEATIONS, BECAUSE WE DON'T HAVE THAT RIGHT NOW. WE SIMPLY HAVE A MOTION THAT REFERS TO CERTAIN LINES BEING DELINEATED AND OTHER LINES BEING ADDED.

" THE COURT: I THINK PERHAPS THE EASIEST THING WOULD BE TO SUBSTITUTE A NEW FRONT PAGE WITH THE CAPTION BEING DIFFERENT.

" MR. CLANCY: YOUR HONOR, I HAVE CERTAIN INTERLINEATIONS THAT ARE MADE THROUGHOUT, WHICH ARE CONSISTENT WITH THE AMENDMENT, AND ALSO ON PREVIOUS OCCASIONS, THE AMENDMENT WAS ORDERED FILED, AS I REQUESTED, AND THE INTERLINEATIONS WERE MADE ON THE COPY ITSELF.

" THE COURT: THAT SEEMS REASONABLE TO ME. I DON'T LIKE TO GET OUR FILES THICKER. WE HAVE THEM THICK TO BEGIN WITH.

" I AM GOING TO LEAVE THAT UP TO THE CLERK. THE BEST WAY TO MAKE THE INTERLINEATIONS IS TO SUBSTITUTE THE NAME OF THE CITY ATTORNEY FOR MR. CLANCY, AS FAR AS THE MOVING PARTY MAY BE MADE.

" MR. DIAMOND: IS THIS CONSIDERED A NEW PLEADING FOR WHICH I NOW HAVE TO FILE AN ANSWER?

" THE COURT: NO, MY THOUGHT WOULD BE YOUR RESPONSE TO THE PLEADINGS BE CONSIDERED THE RESPONSE TO THE AMENDED PLEADING, WITHOUT ANY PREJUDICE TO ANY ADDITIONAL CHANGES YOU WISH TO

MAKE.

" IF YOU WISH TO PLEAD THAT IT IS IMPROPERLY BROUGHT, AND MR. HOLMES DOES NOT CONSENT, YOU MAY SO PLEAD; OTHERWISE, TO ACCEPT ANY DECISIONS YOU WISH TO MAKE BECAUSE OF THE CHANGES, THEY MAY BE CONSIDERED AS RESPONSE TO A PRESENT --

" ANY OBJECTION?"

There is no evidence in the record to support the Court's contrary conclusion. This Court's opinion has refused to grant that part of Ebel's Cross-Petition which seeks the following additional relief:

> "to compel the court to vacate its order. . . permitting plaintiffs' to amend the complaint."

(See opinion at page 4, lines 11-15, and page 17, lines 5-6). The Court's statement in that regard are misstatement of fact and law and unsupported "assumptions" by the person writing the opinion.

1.

(C) IT IS A DENIAL OF DUE PROCESS FOR THIS COURT TO CONTRADICT JUDGE HENNIGAN'S FINDINGS AND ORDER OF APRIL 20, 1984 WITHOUT EXPLAINING WHEREIN JUDGE HENNIGAN'S ORDER WAS IN ERROR OR DIRECTING THAT SUCH ORDER BE VACATED AND ANNULED AND THE REASONS THEREFORE.

The petition for writ of mandate herein which was originally filed by Petitioners in the Court of Appeal was titled People of the State of California on the relation of the City Attorney of Corona, California; City of Corona, a municipal corporation v. Superior Court of the State of California for the County of Riverside. That titling was pursuant to the authority of Judge Hennigan's ruling on April 20, 1985 that Attorney Clancy did, in fact, represent the City Attorney of the City of Corona. The opinion of this Court filed on September 16, 1985 has changed the title of this action to The People ex rel. James J. Clancy as City Attorney; etc.,

et al., Petitioners v. The Superior Court of Riverside County, Respondent. Petitioners submit that it is a denial of due process of law for this Court to contradict Judge Hennigan's Order of April 20, 1984 and now rule, collaterally, that the petition for writ herein was not brought upon the relation of the City Attorney without explaining wherein Judge Hennigan's ruling was in error or directing that such ruling be vacated and annulled and the reasons therefore.

1.

(D) THE MISSTATEMENTS OF FACT AND LAW IN THE COURT'S OPINION THAT: (1) THE CITY ATTORNEY HAD NOT GIVEN HIS APPROVAL TO THE AMENDMENT TO THE COMPLAINT, AND (2) THAT ATTORNEY CLANCY WAS NOT REPRESENTING THE CITY ATTORNEY OF THE CITY OF CORONA ARE MATERIAL MISSTATEMENTS IN THAT, WITHOUT THEM, THE COURT'S ANALYSIS IS UNDERMINED AND ITS RULING THAT ATTORNEY CLANCY'S DISMISSAL IS AUTHORIZED CANNOT STAND.

The misstatements of fact and law

in the Court's opinion that: (1) the City Attorney had not given his approval to the amendment to the complaint, and (2) that Attorney Clancy was not representing the City Attorney of the City of Corona are "material" in that they constitute the singular basis for the Court's analysis and the Court's mandate "dismissing Clancy as the City's attorney in the pending action."

Petitioners submit that the contrary finding and Order of Judge Hennigan that: (1) the City Attorney had given his approval to the amendment to the complaint, and (2) that Attorney Clancy was representing the City Attorney of the City of Corona, and the terms of the written contract which specifically provide as to such employment:

" A. Employment of Attorney

City hereby agrees to employ

> attorney, for the fees hereinafter spedified, to assist the City Attorney of CITY, when and as requested by said City Attorney to do so, in connection with litigation to abate certain conditions within the CITY, determined by the Council under the provisions of Ordinance No. 1689 to be pulic nuisances, or to defend the CITY if it should be named . . .
>
> ". . . .
>
> " C. Control of Litigation
>
> ATTORNEY agrees that each and every case, suit or proceeding in which he undertakes to assist the City Attorney of CITY, as aforesaid, shall be and remain under the subject to the control and direction of said City Attorney or the City Council of CITY at all stages, and that he shall at all times keep said City Attorney informed of all matters pertaining thereto."

undermine the Court's analysis that dismissal is authorized.

Under the above written terms of the City's contract, the control and direction of the case is in the hands of the City Attorney, not Attorney Clancy. Further, as this Court concluded in its

opinion at page 16, footnote 5:

> "Thus on remand the action herein should be brought in the name of Dallas Holmes, the Corona City Attorney. The City may hire Clancy to represent Holmes. (Govt. Code §37103)"

In this regard, Government Code § 37103 provides city councils the following specific authority:

> "§ 37103. Contracts for special services and advice: Compensation
>
> The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal or administrative matters.
>
> "It may pay such compensation to these experts as it deems proper." (Our emphasis.)

1.

(E) THE COURT'S ANALYSIS PRESENTS AN IRRECONCILABLE CONFLICT BETWEEN THE COURT'S "ASSUMPTIONS" (MISREPRESENTATIONS OF OPPOSING COUNSEL AT ORAL ARGUMENT ON JUNE 12, 1985) AND THE SPECIFIC TERMS OF THE CONTRACT.

The analysis in the Court's opinion presents an irreconcilable conflict. The

central issue is the construction to be given to the written contract between Attorney Clancy and the City of Corona. The Court's analysis concludes that the contingency provision is against public policy and must be set aside because Attorney Clancy is not under the control of the City Attorney of the City of Corona, yet the terms of the written contract, as noted above in Point 1.(D), define the legal relationship between Attorney Clancy and the City Attorney to be one in which Attorney Clancy is under the control of the City Attorney. At oral argument on June 12, 1985, Attorney Clancy requested this Court to examine the misrepresentations of facts and arguments of opposing counsel in the light of the specific terms of the written contract which define the contractual relationship to be entirely different from that which the "Book

Store" attorney was "arguing" to the Court.

1.

> (F) AN AUGMENTATION OF THE RECORD UPON REHEARING WILL ESTABLISH THAT ATTORNEY CLANCY, BY LETTER DATED APRIL 12, 1984 AND EIGHT DAYS PRIOR TO THE HEARING ON THE MOTION TO AMEND, TRANSMITTED A COPY OF THE PROPOSED AMENDED COMPLAINT TO CITY ATTORNEY DALLAS HOLMES WITH A PROPOSED DRAFT OF AN AMENDING RESOLUTION WHICH WAS THEREAFTER PRESENTED TO AND ADOPTED BY THE CITY COUNCIL AS RESOLUTION NO. 84-35.

Petitioners' counsel makes the following offer of proof in support of this Petition for Rehearing:

> "That if Petitioners' Petition for Rehearing is granted, and the record is augmented to include Attorney Clancy's letter of April 12, 1984 to City Attorney Dallas Holmes, said record will establish that a copy of the motion to amend the complaint and a copy of the proposed amendment to the complaint was sent to City Attorney Dallas Holmes eight days before the hearing on the motion (see copy fo amendment at Exhibit C to Real Parties in Interest Cross-Petition, on file in this Court), with a recommendation that City Attorney Dallas Holmes present to the City Council an amendment to Resolution

> 83-102, directing that the special counsel commence the action "on the relation of the City Attorney of Corona", which thereafter City Attorney Dallas Holmes did, in fact, present to the City Council and which the City Council did, in fact, pass as Resolution 84-35 (see copy at Exhibit 2 to the Replication on file in this Court).

A copy of said letter of Attorney James J. Clancy to City Attorney Dallas Holmes, dated April 12, 1984, in support of said offer of proof appears on the page following this offer of proof.

Petitioners submit that the above offer of proof confirms Attorney Clancy's representation to the trial court at oral argument on April 20, 1985, and Judge Hennigan's Finding of Fact and Order thereon on April 20, 1984, and contradicts the contrary "assumption" and innuendo, caused by opposing counsel's misrepresentations, which this Court makes throughout its opinion.

/// /// ///

B-29A

JAMES J. CLANCY
ATTORNEY AT LAW
9055 LA TUNA CANYON ROAD
SUN VALLEY, CALIF.

AREA CODE 213
352-2069

April 12, 1984

Mr. Dallas Holmes
Best, Best & Krieger
4200 Orange Street
Riverside, California 92502

Re: People of the State of California et al. v. The Book Store et al., No. 160755

Dear Dallas;

I am enclosing a copy of our motion to file an amendment to the pleadings in the Book Store case.

Diamond has stipulated to an order shortening time to set the motion for a hearing on Friday, April 20, 1984 and is being served today by mail. Judge Hennigan's office has indicated that we can get our order shortening time.

I do not anticipate any problems and believe that Judge Hennigan will grant our motion on the 20th. However, it may be well to have the City Council take specific action at its next meeting on April 18th to amend Resolution 83-102 by inserting after the word "ordered" on page 11, line 1, the words and phrases: "to commence a civil lawsuit naming as plaintiffs the City of Corona and People of the State of California, on the

relation of the City Attorney of Corona, California, and".

Our Supplemental Memorandum in opposition to the motion to quash is being finalized and will be mailed to you tomorrow.

Sincerely,

James J. Clancy

JJC/cac
enclosure

2.

THE RATIONALE EMPLOYED BY THE COURT IN STRIKING THE CONTINGENCY FEE ARRANGEMENT VIOLATES DUE PROCESS AND EQUAL PROTECTION OF THE LAW GUARANTEES.

The rationale employed by the Court in striking the contingency fee arrangement violates due process and equal protection guarantees. If applied equally across the board it would preclude attorney fee awards that are regularly awarded under the private attorney general principle, C.C.P. § 1021.5, and under the civil rights attorney fee statute, 42 U.S.C. § 1988, and would preclude the employment of attorneys who work daily in the courtroom "performing tasks on behalf of and in the name of government", see opinion at page 11, under tne aegis of those statutes. The private attorney-general and civil rights attorneys work under contingency fees which employ the

same principles as the prototype which this Court finds is against public policy. In one of those "landmark" cases, the contingency payment was defeated by the State Legislature which refused to pay the award. In that case, it took the extraordinary power of the California Supreme Court to direct that the funds be provided to satisfy the contingency.

When this issue was addressed by Petitioners' counsel at oral argument, it was given recognition by Associate Justice Grodin in his remarks from the bench which adverred to the "Fox" case in Los Angeles. That issue, however, has not been dealt with by this Court in its opinion.

The double standard which this Court has established re moral public nuisances raises "due process" and "equal protection of the law"

constitutional questions of major proportions. See, for example, the language employed in this Court's opinion at page 14, reading:

> " Similarly, the abatement of a public nuisance involves a balancing of interests. On the one hand is the interest of the people in ridding their city of an obnoxious or dangerous condition; on the other hand is the interest of the landowner in using his property as he wishes. And when an establishment such as an adult bookstore is the subject of the abatement action, something more is added to the balance: not only does the landowner have a First Amendment interest in selling protected material, but the public has a First Amendment interest in having such material available for purchase. Thus, as with an eminent domain action, the abatement of a public nuisance involves a delicate weighing of values. Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated."

and at page 7, where this Court holds:

> "Thus we may order that Clancy be dismissed from the case <u>if we find the contingency fee arrangement prejudices the Ebels</u>." (Our emphasis.)

Petitioners submit that, from a

constitutional standpoint, the intellectual interpretation given to the contingency fee provisions, as noted in its opinion above, does not justify the "double standard" which the Court opinion has created as to moral pubic nuisances and does violence to the doctrine of separation of powers.

2.

(A) THE COURT'S OPINION HAS FAILED TO WEIGH IN THE BALANCE THE CITY'S HISTORIC POWERS TO ABATE MORAL PUBLIC NUISANCES.

The constitutional implications here are clear-- the trial facts demonstrate a public concern as to "rights affecting the public interest" which are real: Ebel and her "Adult Book Store" (whose interest is being balanced) moved in on a residental neighborhood in the City of Corona and on the same block as a neighborhood grammar school, and the City of Corona, in attempting to exercise its historic

governmental (police) powers to abate moral public nuisances, is alleging a public nuisance and undertaking a burden of proof that the state obscenity statutes (not "sexually oriented" or "adult bookstore standards" as the opinion infers are at issue) are being violated. The contract herein was well within its governmental powers to achieve that objective and is not subject to the disability set forth in this Court's opinion. On the power of a City to abate moral public nuisances, see James Phalen v. Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> " The suppression of nuisances injurious to public health or morality is among the most important duties of government. . . It is a principle of the common law, that the king cannot sanction a nuisance."

It is a fundamental rule of the common law that "the Courts are the guardians of the public morals," Sir Charles

Sedley's Case, 1 SID 168; Rex v. Curl, 2 Strange 789 (1727). The power of Courts of Equity, in regard to public nuisances, transcends that of Courts of Law and "is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community." Mugler v. Kansas, 123 U.S. 205 at 214 (Dec. 5, 1887). See, also, Government Code §§ 38771, 38773 and 38773.5; H.G. Wood, The Law of Nuisances, §§ 23 and 24 at pages 45-46, § 32 at page 53, § 57 at page 77, § 65 at page 85, and § 743 at page 972; Joyce, Laws of Nuisances, § 345 at 498 and 507.

2.

(B) THE COURT's OPINION VIOLATES THE GOLDEN RULE OF STATUTORY CONSTRUCTION WHICH FAVORS A PRACTICAL INTERPRETATION OVER A TECHNICAL ONE.

The unreasonableness of this Court's generalized approach does not

become apparent until one compares the language of the Court's opinion to the practical facts which are of record and before this Court, including the photographic exhibit attached to the affidavit of Corona Police Detective Les Scott, which demonstrates the nature of the "poisoned apple" which is being offered by Ebel on real estate adjoining the grammar school property.

The "practical facts" of record which bear on the issue of "unreasonableness" include the fact that the outside limit of the attorney fee contract is $60.00 per hour. In the prevailing market today, $60.00 per hour is below the average hourly rate for general attorney services, much less for one who specializes in a particular area of the law. In the oral arguments, the Petitioners noted this fact. Further, Petitioners direct this Court's

attention to California Attorney's Fees Award Practice (Cont. Ed. Bar Supplement, March, 1985) at page 41, reading:

> " Other potential means for showing rate include surveys conducted by various groups. For example, Altman & Weil's 1983 Survey of Law Firm Economics indicated that billing rates nationally averaged $69 per hour for attorneys with less than two years experience, $80 per hour for two to four years experience, $95 per hour for four to five years, $114 for six to ten years, $135 for 11 to 20 years, and $140 for over 21 years. Larger firms charge approximately 20 percent more. The survey also noted that California fees are higher than the national average." (Our emphasis.)

in spite of the above facts, this Court's opinion alleges that:

> " In the case at bar, Clancy has an interest in the result of the case; his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City." (Our emphasis.)

The above allegation, in context with

the facts, misstates the contractual relationship between Attorney Clancy and the City of Corona. To generalize as it does on the rate of $60.00 per hour (which is the outside limit of the attorney fee contract) and under these circumstances is misleading: (1) The $30.00 "hourly rate" is but half of Attorney Clancy's regular "nourly rate", and (2) it cannot be stated that under the fee agreement that the rate will increase ipso facto if Attorney Clancy is successful. Also, a contract which says that Attorney Clancy should receive a fair market return for his services if he performs successfully and less than that if he is unsuccessful, does not, in any way, infer that something wrongful or against public policy is being indulged in by Attorney Clancy or the City and, in answer to the test posed by this Court in its opinion at page 7, in

no way can it be said that "the contingency fee arrangement prejudices the Ebels". Were the facts otherwise, such as were a "multiplier" factor involved, as in Blum v. Stenson, 79 L.Ed.2d 891, 104 S.Ct. 1541, the Court's generalized analysis would be more in point.

One of the additional "practical facts" of record which bears upon the "unreasonable" quality of the Court's generalized approach is the fact that the contract as applied does not function in the manner in which this Court's opinion holds is against "public policy". Although Petitioners' counsel described in detail at the oral argument the manner in which the contract functioned, and pointed out that such did not result in the abuses which some members of the Court envisioned, the Court's opinion does not respond to that

issue and argument.

Realistically viewed, the $60.00 per hour fee is nothing more than a statement of the fair market value of Attorney Clancy's services. As to the City, the contract was not a contingency contract in that, under all circumstances, only $30.00 was to be paid by the City. Further, as to Attorney Clancy, the contingency provision of his fee was in the hands of the California judicial system which was in charge of administering the fee. The additional fee, if any, would only be awarded if Attorney Clancy were able to convince the trial court, at an adversary hearing at which Ebel would be the adversary, that his services were so deserving that he was entitled to a rate greater than $30.00 per hour (<u>half</u> his regular rate), based upon the "reasonable attorney fee" concept, and that any amount over $30.00

would be assessed by the trial court against the malefactor and not the City. For example, two conditions might arise:

(1) The City lost-- Attorney's fee sould be $30.00 per hour.

(2) The City won-- Attorney's fee would still be $30.00 per hour. At an adversary hearing on a motion for an attorney's fee under C.C. § 3496, at which California law would govern, the trial court might set the attorney's fee at $30.50 per hour, in which event, Attorney Clancy would only be paid fifty cents per hour more (not $60.00 per hour), and that amount under the state statute would be assessed against the malefactor Ebel (not the City.)

In sum, Attorney Clancy would not receive the fair market value for his services ($60.00 per hour) unless he proved to the Court that he had performed in a manner which showed himself to merit the payment for a "fair market value".

The opinion of this Court relating to the contingency fee provision is not

in accord with acceptable standards of statutory construction. It has been called a golden rule of statutory interpretation that:

> "Unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result. It is a 'well established principle of statutory interpretation that the law favors rational and sensible construction'". Sutherland Statutory Construction, Sands, 4th edition, Vol. 2A at page 54.

See also, Samarkand of Santa Barbara, Inc. v. County of Santa Barbara, 216 Cal.App.2d 341, 31 Cal.Rptr. 151 (1963); Metro Realty v. County of El Dorado, 222 Cal.App.2d 508, 35 Cal.Rtpr. 480 (1963); Harris v. Alcoholic Beverage Control Appeals Board, 223 Cal.App.2d 563, 35 Cal.Rptr. 865 (1963); People v. Buzard, 38 Cal.Rptr. 63 (Cal.App. 1964); Moeser v. County of San Diego, 227 Cal.App.2d 563, 38 Cal.Rtpr. 813 (1964); People v.

One 1962 Chevrolet Bel Air, 248 Cal.App. 2d 874, 56 Cal.Rptr. 878 (1967); People ex rel. San Francisco Bay Conservation & Development Commission v. Town of Emeryville, 72 Cal.Rptr. 790, (1968). A practical interpretation is favored over a technical one. Stanley v. Justice Court of Auburn Judicial Dist., County of Placer, 55 Cal.App.3d 244, 127 Cal.Rptr. 523 (1976). See Denio v. Huntington Beach 22 Cal.2d 580 (1943), where this Court stated, in construing a similar contract for special counsel, that the contract should not be construed in a narrow and limited sense. Particularly should this be so, where a City's power to abate moral public nuisances is involved, and where to proceed otherwise would involve serious constitutional questions involving the doctrine of separation of powers and due process and equal protection of the law.

3.

THE DECISION OF THIS COURT DOES NOT ANSWER THE QUESTION PRESENTED IN PETITIONERS' PETITION FOR WRIT OF MANDATE REGARDING THE SUBPOENA DUCES TECUM. IN DECIDING THAT ISSUE ON INDEPENDENT GROUNDS, THE OPINION HAS ASSUMED FACTS WHICH ARE NOT IN EVIDENCE AND WHICH ARE CONTRARY TO THE FACTS OF RECORD.

The decision of this Court on the subpoena duces tecum issue does not answer the "Question Presented" by Petitioners. In deciding the merits of the case on independent grounds, the Court premises its decision upon two material misstatements of fact which are contrary to the record.

At page 5, lines 4-14, the Court incorrectly recites the Statment of facts of record as being:

> ". . . The parties agree that certain elements of the crime have been established by independent evidence (i.e., existence, possession, and authentication), and thus the act of producing the magazines is to that extent not 'testimonial' and 'incriminating.' (See Fisher v. United States (1976) 425 U.S. 391, 408.) However, the parties

> disagree whether the element of scienter, which must be proved in order to convict, has been established by other evidence and whether it would be established by the act of gathering the magazines and bringing them into court."

The latter sentence does not correctly state the issue which has been drawn by Petitioners' pleadings or the nature of the "disagreement" of the parties.

Further, the opinion misstates the record at page 6, lines 6-7, where it states:

> "The magazines named in the subpoena duces tecum are the property of the Book Store, an artificial entity, that cannot claim the privelege against self-incrimination."

Nowhere in the record is there any evidence to show that the magazines are the property of the Book Store or any other person or entity.

Petitioners have made only one contention in these writ proceedings and that is the "Question Presented" in its petition for writ of mandate at page 13,

reading:

" QUESTION PRESENTED

" Whether, under recognized principles of general law or waiver, a person called as a witness at a hearing on a motion for a preliminary injunction can be compelled under a subpoena duces tecum to produce 262 magazines where:

" (A) the identity and existence of the 262 magazines has previously been established by a declaration in support of the issuance of the subpoena, and

" (B) there is a showing by independent evidence that such magazines at the time of service were in the possession of such witness in a representative capacity and for the purpose of offering the same to the public for sale at the "Book Store" as a part of a commercial venture, and

" (C) the preliminary injunction hearing was originated by the City of Corona under a claim of damage to public morals, and in response to a challenge of the operator of the "Book Store" that she has a right to continue offering such magazines for sale at the "Book Store" pending the determination of a public nuisance abatement (Obscenity)

> lawsuit arising out of such possession for sale."

Petitioners' arguments under the above narrow question is that the facts which are of record show that U.S. v. Doe, supra, and Fisher v. U.S., supra, are squarely in point and are controlling and that any person in charge of the premises when served with the subpoena duces tecum to produce magazines which have been established by evidence aliunde as: (1) being in existence, and (2) being in his possession, and (3) authenticated as the subject matter under litigation in the lawsuit, must produce such evidence. Bellis v. U.S., 417 U.S. 85, cited by the opinion at page 6, lines 1-3, is clearly not in point or controlling on the above Question and stated facts.

Under the above argument, Petitioners contend that under U.S. v. Doe, supra, the element of "scienter",

is inapposite. See Answer to Petition for Hearing at page 7, line 25 through page 9, line 28). Contrary to the above Statement of Facts in this Court's opinion, Petitioners did not join issue with the Real Parties in Interest in their claim that the issue of "scienter" was pertinent. Petitioners contension is and was that "scienter" was inapposite to the issue which was being presented to the Court.

Petitioners submit that this Court has the undoubted right to decide the merits of the case on its own grounds, but may not if it must assume facts which are not in evidence to accomplish that result.

4.

THE OPINION OF THIS COURT MAKES SEVERAL ADDITIONAL MISSTATEMENTS OF FACT.

At page 3, lines 6-10, the opinion states:

> ". . . Clancy had drafted this and the previous ordinances relating to the sale of sexually explicit material, and had presented them for consideration by the City Council. He is associated with an organization entitled Committee for Decency through Law."

The "previous ordinances relating to the sale of sexually explicit material" were not drafted by Attorney Clancy, nor did he present them to the City Council for consideration, nor did he recommend the adoption of such an ordinance relating to the sale of sexually explicit material except in conjunction with the adoption of a second public nuisance abatement ordinance setting forth a specific procedure for the abatement of obscene subject matter which is in derogation of State law.

Attorney Clancy is not associated with an organization entitled "Committee" for Decency Through Law but does perform legal services for a non profit corporation known as "Citizens for

Decency through Law, Inc.", an Ohio corporation, under a retainer agreement.

At page 3, lines 11-14, the opinion states:

> " . . . Following an investigation by the police department, the City adopted a resolution declaring the Book Store to be a public nuisance and revoking its business license. . ."

The above statement is incomplete and, as such, is a misstatement of fact. The incomplete nature of the statement suggests an infirmity in the ordinance under existing case law. The statement of fact should include the following additional statement to remove the innuendo:

> "The revocation of business license was subject to confirmation by the Riverside County Superior court in judicial proceedings to abate the place as a public nuisance which was required by such ordinance. Criminal proceedings for transacting business without a license arising out of the licence revocation were not authorized until the City Council's order of license revocation had been confirmed by a judicial order of

the Riverside County Superior Court. (See section 2 of Resolution No. 83-102.)

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge this Court to grant the Petition for Rehearing and issue a second opinion which takes into consideration the above objections, or dismiss the Petition for Hearing of the Real Parties in Interest as improvidently granted, and order the decision of the Court of Appeal to be published.

DATED: October 1, 1985

Respectfully submitted,

JAMES J. CLANCY
Attorney for Petitioners.

APPENDIX C

ORDER OF CALIFORNIA SUPREME COURT DENYING REHEARING. MODIFICATION OF OPINION. REMITTITUR, FILED NOVEMBER 20, 1985

. . . . . C1-C6

C-1

Order Due
December 13, 1985
SUPREME COURT
FILED
NOV 20 1985
LAURENCE P. GILL, CLERK

DEPUTY

ORDER DENYING REHEARING

L.A. No. 32041

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE EX REL. CLANCY, ETC., ET AL.,

Petitioners

v.

THE SUPERIOR COURT OF THE COUNTY OF RIVERSIDE, Respondent;
EBEL ET AL., Real Parties in Interest

(AND COMPANION CASE)

Opinion modified. Petition for rehearing DENIED.

BIRD
Chief Justice

SUPREME COURT
FILED
NOV 20 1985
LAURENCE P. GILL, Clerk

Deputy

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

HELEN E. EBEL et al.,

Real Parties in Interest.

HELEN E. EBEL et al.

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Real Parties in Interest.

L.A. 32041

Super.Ct. 160775

MODIFICATION OF OPINION

BY THE COURT:

The above entitled opinion, filed September 16, 1985, is modified as follows:

Page 3, lines 6-10, are deleted.

Page 15, footnote 4, lines 1-3, are deleted and replaced with the following: "It appears that attorney Clancy may have had little [rest of footnote unchanged]."

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

REMITTITUR

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

HELEN E. EBEL et al.,

Real Parties in Interest.

HELEN E. EBEL et al.

Petitioners,

v.

THE SUPERIOR COURT OF RIVERSIDE COUNTY,

Respondent;

THE PEOPLE ex rel. JAMES J. CLANCY, as City Attorney, etc., et al.,

Real Parties in Interest.

No. LA 32041

C-5

Appeal

County Riverside

Superior Court No. 160755

The above-entitled cause having been heretofore fully argued, and submitted, It Is Ordered, Adjudged, and Decreed by the Court:

Let a writ of mandate issue directing the court to vacate its order that Thomas Ebel need not produce the magazines listed in the subpoena, and issue a new order enforcing the subpoena and dismissing Clancy as the City's attorney in the pending action. In all other respects the petition is denied.

I, Laurence P. Gill, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 16th day of September,

1985.

Witness my hand and the seal of the court this 20th day of November, 1985.

(SEAL)

Laurence P. Gill
Clerk
By KENNETH A. WAGOVICH
Deputy

APPENDIX D

OPINION OF COURT OF APPEAL, FOURTH DISTRICT, DIVISION TWO, FILED ON NOVEMBER 15, 1984, IN PEOPLE OF THE STATE OF CALIFORNIA V. SUPERIOR COURT, RIVERSIDE COUNTY; THE "BOOK STORE", ETC., ET AL., REAL PARTY IN INTEREST D1-D25

FILED
Keenan G. Casady, Clerk
NOV 15 1984
COURT OF APPEAL
FOURTH DISTRICT

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTIRCT

DIVISION TWO

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

PETITIONER,

v.

SUPERIOR COURT, RIVERSIDE COUNTY,

RESPONDENT;

THE "BOOK STORE," etc, et al.,

Real Party in interest.

E000934

(Super.Ct.No.160775)

OPINION

ORIGINAL PROCEEDING; application for a writ of mandate. J. David Hennigan, Judge. Writ granted.

James J. Clancy for Petitioners, City Attorney of Corona, California, and City of Corona.

Hecht, Diamond & Greenfield and Roger Jon Diamond for Real Parties in Interest Helen E. Ebel and Thomas Charles Ebel.

No appearance for Respondent.

In this petition for writ of mandate, petitioners, the State of California on relation of the City Attorney of Corona and the City of Corona (city), appeal from an order granting the motion of real parties in interest, the "Book Store," Helen E. Ebel, Thomas Charles Ebel and Eugene Van Zee, to quash a subpoena duces tecum in an action to abate a public nuisance.

The essential facts are not in dispute. On June 15, 1983, the city adopted an ordinance setting forth procedures for the abatement of certain

types of public nuisances in the city. The ordinance defined as a public nuisance: "Any and every place of business in the City . . . in which obscene publications constitute all of the stock in trade, or a principal part thereof . . ." Two weeks earlier, when the ordinance was originally introduced, the city had retained the services of James J. Clancy, a private attorney, to represent the city in any lawsuits brought pursuant to the aforesaid public nuisance ordinance.

Petitioners, represented by Mr. Clancy, shortly thereafter filed a complaint against the real parties in interest for abatement of a public nuisance, declaratory judgment and an injunction. Petitioners dispatched several police officers to the "Book Store" for the purpose of photographing the literature on sale in the retail

section of the store and the motion picture films on exhibit in the "arcade" section. The officers photographed some 262 different magazines and books. The photographs together with a declaration by the police officer in charge of the surveillance operation were filed with the respondent superior court in support of petitioners' motion for a preliminary injunction.

Shortly thereafter, petitioners served a subpoena duces tecum upon real parties in interest demanding the production of the aforesaid 262 publications as evidence in support of a preliminary injunction that obscene materials were being offered for sale. Although the subpoena was originally served upon Timothy Groover, the clerk in charge of the store, the parties by stipulation have deemed the subpoena to have been served upon real party in

interest Thomas E. Ebel.

Real parties in interest moved to quash the subpoena duces tecum and to disqualify petitioners' counsel, Mr. Clancy. After a hearing on the motions, the trial court permitted petitioners to amend the complaint by deleting Mr. Clancy's name as relator and substituting "the City Attorney of Corona." The trial court granted the motion to quash the subpoena duces tecum on the grounds that the materials requested were privileged under the Fifth Amendment. Petitioners then filed this action seeking to overturn the order of the trial court on the grounds that the materials were not protected by the Fifth Amendment privilege against self-incrimination. We issued an alternative writ of mandate. After further briefing and oral argument, we have determined to issue a peremptory

writ.

DISCUSSION

Before turning to the substantive merits of the petition, we must first address certain procedural issues. Real parties assert several "affirmative defenses" to the petition challenging the qualifications of petitioner's counsel, James J. Clancy.

First, real parties contend that the petition should be dismissed because the underlying public nuisance action was brought on the relation of Mr. Clancy rather than Mr. Dallas Holmes, the City Attorney of Corona. Code of Civil Procedure section 731 provides in part: "A civil action may be brought in the name of the People of the State of California to abate a public nuisance . . . by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city

in which such nuisance exists . . . and such district attorney or city attorney . . . must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city."

The record in the case sub judice reveals that the trial court permitted petitioners to amend the complaint by substituting for "James J. Clancy" as relator "the City Attorney of Corona." Mr. Clancy had earlier signed a contract with the city agreeing to conduct the lawsuit "as an independent contractor and not an officer or employee of [the] City." Prior to the substitution, the city adopted a resolution authorizing Mr. Clancy to conduct the lawsuit in the name of the "City of Corona and People of the State of California, on the relation of the City Attorney of Corona,

California . . ."

Notwithstanding the amendment, real parties in interest appear to argue that Code of Civil Procedure section 731 requires that the lawsuit be conducted by the city attorney in deed as well as in name. However, real parties cite no authority and offer no persuasive rationale in support of this proposition. Hence we conclude that petitioners have fully complied with the provisions of Code of Civil Procedure section 731 by bringing the lawsuit on the relation of the "City Attorney of Corona" pursuant to the express authorizaton of the City Council of Corona.

Real parties next contend that the petition should be dismissed because of a contingency fee arrangement between

the city and Mr. Clancy.[1/] They argue that the underlying action to abate a public nuisance is analogous to a criminal prosecution, and that like a public prosecutor Mr. Clancy's primary goal should be to obtain justice, not victory. The contingency fee arrangement, it is argued, creates a conflict between Mr. Clancy's private financial interest and the public interest which he represents.

We do not find the analogue to be persuasive. Obviously, a public prosecutor must be absolutely neutral. The life or liberty of an accused hangs in the balance. The state's object is not to win or lose, but to ascertain the truth and to do justice. However, in neither their Answer to the Petition nor

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[1/] Actually, under the terms of the agreement, Mr. Clancy receives an hourly fee regardless of the result of the lawsuit. The hourly fee doubles if the lawsuit is successful. Thus it is the amount, not the very existence, of the fee which is contingent upon the outcome.

their responses at oral argument have real parties identified any equally compelling interests at stake in this civil action to abate a public nuisance which would require the same absolute neutrality on the part of the city's attorney.

The only relevant noncriminal case cited by real parties, City of Los Angeles v. Decker (1977) 18 Cal.3d 860, involved an eminent domain action. In holding that the city attorney had acted improperly in withholding certain evidence concerning the value of the subject property, the Decker court noted that the duty of the condemner in an eminent domain action is of a "quasi-judicial" nature; the government must "strike a just balance between the economic interests of the public and those of the landowner," and the duty of the government's attorney is accordingly

of a "high order." (Id., at p. 871.)

Clearly, where the nature of the civil action itself is of a "quasi-judicial" nature, we may fairly demand the same absolute neutrality on the part of a city attorney that we demand of a criminal prosecutor. However, where the civil action undertaken by the government lacks this special "fairness" element, we perceive no reason in logic or public policy for broadly holding that attorneys who represent the public may not be employed on a contingency fee basis. The issue is one that must be decided by reference to the particular facts and circumstances of each case. Here real parties have offered no persuasive rationale for finding that the contingency fee arrangement compromises Mr. Clancy's ability to represent fairly the interests of the public, including real parties. Nor do

we perceive any. Therefore we decline either to disqualify Mr. Clancy as counsel for the city or to dismiss the petition.

Lastly, real parties contend that the petition must be dismissed because the underlying action was brought in the name of the City of Corona as well as the State of California. In support of this contention, real parties cite Code of Civil Procedure section 731, which authorizes county and city attorneys to bring public nuisance actions "in the name of the People of the State of California." However, real parties have referred us to no authority, nor have we found any, which precludes the city from being a party to the action. Under the common law, both cities and counties have long maintained actions to abate a public nuisance. (See County of Sierra v. Butler (1902) 136 Cal. 547, 550-551;

San Francisco v. Buckman (1896) 111 Cal. 25.) We do not believe that the statute, by empowering city and county attorneys to bring actions on behalf of the People of the State, operates to deprive concerned cities or counties from maintaining such actions in their own behalf. (See Johnson v. V.D. Reduction Co. (1917) 175 Cal. 63, 66 [noting that it was not the intent of the Legislature in enacting the 1905 amendment to Code of Civil Procedure section 731 to diminish the preexisting rights of private parties to maintain public nuisance actions].)

We hold that the City of Corona, as a beneficially interested party in the proceedings below, is a proper party to the petition.

We turn now to our final task, which is to determine whether the trial court properly granted the motion to

quash on the grounds that the production of the subpoenaed materials was privileged under the Fifth Amendment.

In Fisher v. United States (1976) 425 U.S. 391, the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination applies only where an individual is "compelled to make a testimonial communication that is incriminating." (Id., at p. 408; original emphasis.) Hence three elements must exist simultaneously before the Fifth Amendment is violated: (1) compulsion of a (2) testimonial communication that is (3) incriminating. (Fisher v. United States, supra, 425 U.S. at 408; United States v. Authement (5th Cir. 1979) 602 F.2d 1129, 1131.)

The Fisher court further held, "[a]lthough the contents of a document may not be privileged, the act of

producing the document may be." (United States v. Doe (1984) ___ U.S. ___ [79 L.Ed.2d 552, 560], citing United States v. Fisher, Supra, 425 U.S. at 410; emphasis supplied.) Those communicative aspects implicit in the act of production which the Fisher court recognized were three: (existence, (2) possession, and (3) authentication. (Fisher v. United States, supra, 425 U.S. at 410; United States v. Doe, supra, 79 L.Ed.2d at 560.)

According to the Fisher court, however, the Fifth Amendment privilege does not attach in every case in which the act of production would compel defendant to admit that the records exist, that they are in defendant's possession, or that they are authentic. "[T]he more difficult issues are whether the tacit averments . . . are both 'testimonial' and 'incriminating' for

purposes of applying the Fifth Amendment. These questions do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." (Fisher v. United States, supra, 425 U.S. at 410.) When the existence, possession or authentication of the documents are not in issue; when the act of production has "minimal" evidentiary value; or when the hazards of incrimination are "trifling or imaginary," the Fifth Amendment is not implicated. (Fisher v. United States, supra, 425 U.S. at 411; United States v. Doe, supra, 79 L.Ed.2d at 560-561, fns. 12, 13; Marchetti v. United States (1968) 390 U.S. 39, 53.) Thus in Fisher the court explored the potential incriminating impact of compelling an accountant to produce the tax records of a client and determined that the

complusion would have only a minimal testimonial value or incriminating effect. "The existence and location of the papers are a foregone conclusion. . . ." (Id., at pp. 411-413.) However, in Doe, the court held that the Fifth Amendment privilege protected a sole proprietor from a government subpoena seeking an exhaustive list of business records, ranging from "telephone toll slips" to "workpapers." (79 L.Ed.2d at 556, fn. 1.) The Doe court deferred to the factual and legal findings of the District and Appellate Courts which had found that the government subpoena was essentially a fishing expedition: "[N]othing in the record . . . would indicate that the United States knows . . . that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession . . . The most plausible inference . . . is

that the Government, unable to prove that the subpoenaed documents exist . . . is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against itself." (United States v. Doe, supra, 79 L.Ed2d at 561, fn. 12, quoting Matter of Grand Jury Empanelled March 19, 1980 (3d Cir. 1982) 680 F.2d 327, 335.)

Numerous cases have applied the Fisher analysis to determine whether the enforcement of a subpoena duces tecum requesting the production of business records carries sufficiently incriminating testimonial significance to invoke the Fifth Amendment privilege against self-incrimination. (See, e.g., In re Grand Jury Proceedings United States (1st Cir. 1980) 626 F.2d 1051, 1056 [submission of a physician's business records would be tantamount to testimony

that the documents existed and were authentic]; Matter of Grand Jury Empanelled on January 17, 1980, (D.N.J. 1981) 505 F.Supp. 1041, 1043 [that the records exist and are possessed by the target is a "foregone conclusion" and hence "turning them over does not rise to the level of testimony within the protection of the Fifth Amendment"]; see also the discussion and the cases cited in The Rights of Criminal Defendants and the Supoena Duces Tecum: The Aftermath of Fisher v. United States (1982) 95 Harv.L.Rev. 683.) The issue arises less frequently, however, in the context of obscenity prosecutions or civil actions to abate the dissemination of obscene materials.

In Anderson v. Coulter (Ariz. 1972) 499 P.2d 103, the City of Phoenix, pursuant to a civil action to enjoin the showing of an allegedly obscene motion

picture, served upon defendant a subpoena duces tecum to produce the film in question. The affidavit in support of the subpoena described the film. Defendants moved to quash the subpoena based upon the Fifth Amendment privilege against self-incrimination. The Anderson court rejected the claim on the grounds that the "existence, identity and authenticity" of the film were already established and need not be proved by reference to defendants' compliance with the subpoena. (Id., at p. 106.) The Anderson court relied in part upon the reasoning of Justice Traynor in Jones v. Superior Court (1962) 58 Cal.2d 56, 60, where he wrote:

> "When the prosecution has ample evidence of the existence, identity and authenticity of documents in the defendant's possession and thus does not need to rely on his knowledge to locate them and to identify them or on his testimony to authenticate them, it may be that his implied admission . . . [from their production] . . .

> would involve too trivial a degree of incrimination to justify invoking the privilege." (Anderson v. Coulter, supra, 499 P.2d at 106.)

In Houston v. Manerbino (Col. 1974) 521 P.2s 166, the Colorado Supreme Court rejected a similar claim with respect to a subpoena ordering defendant to produce an allegedly obscene motion picture. The Houston court deemed it "ludicrous to say that a person can display, promote and show moving pictures . . . and then claim that he has the Fifth Amendment as a shield to prevent production of the moving picture films at a hearing which the courts must conduct on the obscenity issue." (Id., at p. 170.)

Applying the foregoing legal principles and decisions to the facts of the case before us compels the conclusion that real parties are not entitled to invoke the Fifth Amendment

privilege with respect to the publications requested in the subpoena. The affidavits and declarations filed in support of the subpoena amply demonstrate that the "existence, possession and authenticity" of the magazines are indeed a "foregone conclusion." (Fisher v. United States, supra, 425 U.S. at 411.) Moreover, real parties themselves need not testify in order to authenticate or identify the books in question, nor obviously could they be forced to do so under the fifth Amendment.

Real parties, however, claim that the incriminatory testimonial disclosure implicit in the act of production goes to the element of "scienter." Penal Code section 311.2 in part provides: "Every person who knowingly . . . possesses . . . with intent to distribute . . . any obscene matter is

guilty of a misdemeanor." (See Smith v. California (1959) 361 U.S. 147.) They argue that enforcing the subpoena would "force [them] to acquire sufficient knowledge of the materials to facilitate [their] prosecution for knowingly possessing them for sale." They contend that Anderson and Houston are distinguishable from this case because the defendants' knowledge of the contents of the films at issue there could be easily inferred from their frequent showings to the public.

Real parties correctly state that the element of scienter in Penal Code section 311.2 requires knowledge by a defendant of the contents of the subject matter. (People v. Aday (1964) 226 Cal.App.2d 520, 540, cert den. 379 U.S. 931 (1964).) However, we are not persuaded that the acts of gathering and producing the materials requested would

be of any evidentiary value in establishing real parties' knowledge of the subject matter. The subpoena does not require real parties to open the books and peruse the contents. It simply requires them to produce the books. To uphold real parties' fatuous claim that the act of production constitutes an implicit admission of knowledge of the contents of the items requested would be ludicrous. We, therefore, conclude that the motion to quash was improvidently granted.[2/]

Let a peremptory writ of mandate issue directing the Riverside Superior

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[2/] Because we hold that the materials are not protected by the Fifth Amendment privilege against self-incrimination, we need not reach petitioners' contention that the "Book Store" clerk may not raise a Fifth Amendment claim as to magazines which are not his personal property, but rather which he holds in a representative capacity. In passing, we note that all of the cases cited by petitioners concerned business records-- none involved the possession for sale of allegedly obscene material or potential criminal liability under an obscenity statute.

Court to vacate its protective order and to issue a new order directing the production of the subpoenaed items forthwith.

The alternative writ is ordered discharged.

CERTIFIED FOR PUBLICATION

Rickles
J.

We concur:

Morris
P.J.

McDaniel
J.

APPENDIX E

ALTERNATIVE WRIT OF MANDATE OF COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION 2, FILED MAY 15, 1984 . . . . . E1-E2

COURT OF APPEAL----STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA, in relation to the CITY ATTORNEY OF CORONA, CALIFORNIA; CITY OF CORONA, a municipal corporation, Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE, Respondent. THE "BOOK STORE," etc., et al., Real Party in Interest.	E000934 COUNTY NO. 160755 Court of Appeal- 4th District- Filed May 15, 1984, Keenan G. Casady, Clerk

THE COURT:

Good cause appearing therefor,

The Petition for Writ of Mandate is GRANTED.

An alternative Writ of Mandate shall issue directing the Riverside Superior Court to set aside and vacate its order dated April 20, 1984, entered in action no. 160755, entitled People

of the State of California, etc., et al. v. The "Book Store," etc., et al., or in the alternative, to SHOW CAUSE before the State Court of Appeal, at its courtroom, 303 West Third Street, San Bernardino, California, at 9:30 a.m. on August 1, 1984, why said order should not be vacated, set aside, and annulled, and a new order entered denying defendants' motion for protective orders and quashing subpoena duces tecum.

Petitioner is directed to have the Alternate Writ of Mandate issued, served, and filed on or before May 28, 1984, and the written return of Respondent and/or Real Party in Interest is ordered filed on or before June 27, 1984. Petitioner shall have to and including July 9, 1984, to file its Traverse, if any.

McDaniel, J.
Acting P.J.

APPENDIX F

ORDER OF THE CALIFORNIA SUPREME COURT FILED APRIL 3, 1986 IN PEOPLE EX REL. CLANCY, ETC., ET AL., PETITIONERS, V. SUPERIOR COURT OF THE COUNTY OF RIVERSIDE, RESPONDENT, EBEL ET AL., REAL PARTIES IN INTEREST. F1

SUPREME COURT FILED
APR. 3, 1986
Laurence P. Gill, Clerk
Deputy

No. L.A. 32041

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE EX REL. CLANCY, ETC., ET AL., Petitioners,

v.

SUPERIOR COURT OF THE COUNTY OF RIVERSIDE, Respondent; EBEL ET AL., Real Parties in Interest

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Application for an order directing the preparation of audio and typewritten copies of the audio tape of the oral argument in the above-entitled cause is DENIED.

BIRD
Chief Justice

APPENDIX G

AGREEMENT FOR LEGAL SERVICES BETWEEN
JAMES J. CLANCY AND CITY OF CORONA,
EXECUTED ON JUNE 1, 1983. . . . . G1-G7

AGREEMENT FOR LEGAL SERVICES

THIS AGREEMENT, made and entered into this 1st day of June, 1983, by and between the CITY OF CORONA, a municipal corporation of the State of California ("CITY"), and JAMES J. CLANCY, ESQ., Attorney at Law, 9055 La Tuna Canyon Road, Sun Valley, California 91352 ("ATTORNEY").

W I T N E S S E T H:

Recitals:

1. CITY desires to employ an attorney at law to assist the City Attorney in the event that the City Council of the CITY should determine to undertake litigation to abate certain conditions within the CITY, determined by the Council to be public nuisances, or to defend the CITY if it should be named as a party defendant in any action or actions or proceeding or proceedings

arising from such determination by the Council, or testing the power of the CITY or the Council so to do, or litigation otherwise arising out of Ordinance No. 1689 of the CITY.

2. ATTORNEY is licensed to practice law in the State of California, and desires to undertake said employment.

WHEREFORE, in consideration of their mutual covenants and agreements, hereinafter contained, and subject to the terms and conditions hereof, the parties hereto do hereby agree as follows:

A. Employment of Attorney

CITY hereby agrees to employ attorney, for the fees hereinafter specified, to assist the City Attorney of CITY, when and as requested by said City Attorney to do so, in connection with litigation to abate certain conditions within the CITY, determined by the Council under the provisions of

Ordinance No. 1689 to be public nuisances, or to defend the CITY if it should be named as a party defendant in any action or actions or proceeding or proceedings arising from any such determination by the Council, or testing the power of CITY or the Council to do so, or otherwise arising out of Ordinance No. 1689 of the CITY. ATTORNEY accepts said employment and agrees to perform all of such services as may be requested by the City Attorney of the CITY in timely and efficient manner.

B. Payment For Services Rendered

CITY agrees to pay to Attorney, and ATTORNEY agrees to accept from CITY, as and for payment in full for all of said services, such sum of money as shall be determined according to the following formula:

$60.00 per hour for each hour of ATTORNEY's services, plus out of pocket

office expenses incident to such employment, provided, however, that with respect to each and every suit undertaken by ATTORNEY hereunder which results in a final judgment against CITY, said fee shall be reduced to $30.00 per hour, plus out of pocket office expenses incident to such employment, and provided further that said fee of $60.00 shall also be reduced to $30.00 per hour, plus out of pocket office expenses incident to such employment, in each and every suit undertaken by ATTORNEY hereunder in which CITY is the successful party if and to the extent that the CITY does not recover its attorney's fees from the unsucessful party or parties.

C. Control of Litigation

ATTORNEY agrees that each and every case, suit or proceeding in which he undertakes to assist the City Attorney of CITY, as aforesaid, shall be and

remain under and subject to the control and direction of said City Attorney or the City Council of CITY at all stages, and that he shall at all times keep said City Attorney informed of all matters pertaining thereto. ATTORNEY further agrees that if and when his employment hereunder is terminated by CITY as hereinafter specified, he shall return to said City Attorney any and all files then in his possession concerning each and every case, suit or proceeding in which CITY is a party, whether the same be then reduced to final judgment or not.

D. Attorney An Independent Contractor

It is mutually agreed by and between the parties that in the performance of his covenants hereunder ATTORNEY is and shall be an independent contractor and not an officer or employee of CITY.

E. Term of Agreement

The term of this Agreement shall commence on the date first hereinabove written, and shall end on a date in the future, which shall be not less than thirty (30) days from and after the date when CITY informs ATTORNEY, in writing, addressed to ATTORNEY at his address aforesaid, deposited in the United States mail, postage prepaid, or when ATTORNEY informs CITY in writing, addressed to the City Attorney, 4200 Orange Avenue, Riverside, California 92502, of its or his intention to terminate this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

CITY OF CORONA
A municipal corporation
State of California

By Lewis Hall
Mayor

ATTEST:

Diedre D. Lingenfelter
City Clerk of the City of
Corona, California

APPROVED AS TO FORM:

City Attorney

JAMES J. CLANCY, ESQ.

By James J. Clancy
"ATTORNEY"